IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HENRY C. YUEN and ELSIE M. LEUNG,	)	
Plaintiffs,	)	
v.	)	C.A. No. 398-N
GEMSTAR-TV GUIDE INTERNATIONAL, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Submitted: June 24, 2004
Decided: June 30, 2004

C. Barr Flinn, Esquire, Sara Beth A. Reyburn, Esquire, YOUNG, CONAWAY, STARGATT & TAYLOR, LLP, Wilmington, Delaware; Stanley S. Arkin, Esquire, Charles S. Sullivan, Esquire, Michelle A. Rise, Esquire, Sean R. O'Brien, Esquire, ARKIN KAPLAN LLP, New York, New York, *Attorneys for the Plaintiffs.*

Allen M. Terrell, Jr., Esquire, J. Travis Laster, Esquire, RICHARDS, LAYTON & FINER, P.A., Wilmington, Delaware, *Attorneys for the Defendant.*

LAMB, Vice Chancellor.

I.

This action arises from a dispute between plaintiffs Henry C. Yuen and Elsie M. Leung and defendant Gemstar-TV Guide International, Inc. ("Gemstar")[1] as to whether the plaintiffs' claims for advancement of legal fees and expenses against Gemstar are subject to compulsory and binding arbitration. Gemstar has filed a motion to dismiss for lack of subject matter jurisdiction, or, in the alternative, to stay the proceeding pending the outcome of arbitration already commenced between the parties. For the reasons that follow, the court concludes that the relevant agreements of the parties require the plaintiffs to arbitrate the advancement claims against Gemstar, and, thus, grants the motion to dismiss.

II.

In the late 1980s, Yuen co-founded Gemstar's predecessor corporation, Gemstar International Group Limited ("GICL"), as a vehicle to sell or license various innovative electronic technologies. Leung joined GICL shortly after its founding. On July 12, 2000, GICL and TV Guide, Inc. merged to form Gemstar. At the time of the merger, Yuen and Leung's employment contracts were adopted

[1] Gemstar is incorporated in Delaware with its principal place of business in Los Angeles, California. Gemstar is a media and technology company that develops, licenses, markets and distributes technologies, products and services targeted at the television guidance and home entertainment needs of consumers worldwide.

by Gemstar, and they became CEO and CFO, respectively, of the merged company.[2]

On October 9, 2002, Gemstar's board of directors approved a restructuring of Gemstar, and executed numerous agreements to that end.[3] As part of the restructuring, Yuen and Leung agreed to step down from their positions as CEO and CFO, respectively. On November 7, 2002, both Yuen and Leung executed respective Termination and Employment Agreements with Gemstar that terminate all aspects of their executive positions with Gemstar and provide for each individual to enter into a new nonexecutive employee capacity going forward after the company was restructured.

The proceedings for which Yuen and Leung seek advancement began in April 2002, when several lawsuits were filed naming Yuen, Leung, Gemstar and others as defendants. On October 17, 2002, shortly after the restructuring, the SEC began a formal investigation of Gemstar. On March 31, 2003, Yuen and Leung

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[2] Yuen also served on GICL's, and later Gemstar's, board from April 1992 to April 2003, and as chairman of the board from January 1999 to April 2003. Yuen was the president and CEO of GICL, and subsequently Gemstar, from August 1994 to November 2002. Leung also served as a member of the board of GICL and then Gemstar from 1994 to April 2003, and as the CFO from 1994 to November 2002.

[3] On November 7, 2002, Yuen, Leung and Gemstar executed five agreements that are relevant to this proceeding: their respective Termination and Employment Agreements, and an Umbrella Agreement to integrate all of the restructuring agreements. The Umbrella Agreement provides: "This Agreement and the Restructuring Agreements contain the entire agreement of the parties relating to the subject matter hereof and thereof and supersede any prior agreements, undertakings, commitments and practices relating to the subject matter hereof and thereof."

commenced an action against the SEC claiming that the SEC had improperly coerced Gemstar into putting in escrow Yuen's and Leung's severance payments from the Restructuring. On April 18, 2003, Yuen and Leung were terminated for cause, and pursuant to their respective Employment Agreements, they each initiated arbitration proceedings on May 30, 2003, challenging those terminations. On June 19, 2003, the SEC commenced an action against Yuen and Leung alleging federal securities laws violations. Also, Yuen and Leung were subpoenaed to make an extensive document production in pending patent litigation against Gemstar. Finally, Yuen and Leung were also notified in October 2003 that they are the target of a criminal investigation pending in the Central District of California.

On April 23, 2004, the plaintiffs filed a complaint against Gemstar in this court for the advancement of legal fees in connection with the aforementioned (civil, criminal, administrative and investigative) proceedings related to the plaintiffs' status as directors or officers of Gemstar.[4] The plaintiffs seek advancement pursuant to Section 145 of the DGCL, Gemstar's Certificate of Incorporation, and their respective Termination and Employment Agreements. Of

[4] The plaintiffs also seek "fees on fees" incurred in bringing this advancement claim.

particular relevance to this decision, the advancement provision of the agreements provides:

> To the maximum extent permitted by applicable law, the Company shall promptly advance to Employee any and all expenses actually incurred by Employee in defending any and all actions, suits, proceedings or investigations or in preparing to defend any threatened action, suit, proceeding or investigation, in each case for which Employee is indemnified by the Company pursuant to 10(a) [the general indemnification subsection].[5]

On May 17, 2004, Gemstar moved to dismiss or stay this action on the grounds that the advancement claims raised by the plaintiffs in their complaint are subject to arbitration pursuant to the arbitration provisions found in their respective Termination and Employment Agreements. The court agrees that the arbitration provisions found in the parties' agreements apply to the advancement claims brought by the plaintiffs and, accordingly, grants the motion to dismiss.

III.

In considering a motion to dismiss for lack of subject matter jurisdiction, the court must address the nature of the wrong alleged and the available remedy to determine whether a legal, as opposed to an equitable remedy, is available and sufficiently adequate.[6] The court "will not 'accept jurisdiction over' claims that

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[5] Termination Agreements § 10(b). The Employment Agreement in § 7 has substantially similar advancement language.

[6] *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001).

are properly committed to arbitration since in such circumstances arbitration is an adequate legal remedy."[7] This comports with Delaware's strong public policy favoring arbitration and Delaware courts will interpret contracts as requiring arbitration if they can reasonably do so.[8] Arbitration, however, is a consensual proceeding, and the court may not require arbitration unless the parties have a contract to arbitrate.[9] Thus, if the plaintiffs' claims are subject to arbitration, this court will dismiss the plaintiffs' complaint for lack of subject matter jurisdiction.[10]

Therefore, the threshold inquiry is whether the parties have an agreement to arbitrate the advancement claims.[11] Here, the parties agree that both the Termination and Employment Agreements require the parties to arbitrate their disputes arising under those agreements. Each agreement's "Resolution of Disputes" clause is identical and states:

> In the event of any dispute, controversy, claim or disagreement between Employee and the Company with respect to any alleged breach of this Agreement, the interpretation of the Agreement, or the

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[7] *Dresser Indus., Inc. v. Global Indus. Techs., Inc.*, 1999 WL 413401, at *4 (Del. Ch. June 9, 1999) (quoting *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987)).

[8] *Pettinaro Constr. Co. v. Harry C. Partridge, Jr., & Sons, Inc.*, 408 A.2d 957, 963 (Del. Ch. 1979).

[9] *Lester Bldg. Assocs., Inc. v. Davidson*, 514 A.2d 1100, 1103 (Del. Ch. 1986).

[10] *Nash v. Dayton Superior Corp.*, 728 A.2d 59, 64 (Del. Ch. 1998).

[11] "[T]he question of subject matter jurisdiction, in essence, conflates with the issue of substantive arbitrability." *Dresser*, 1999 WL 413401, at *5. "In determining arbitrability, the court must decide whether a dispute is one that, on its face, falls within the arbitration clause of an agreement, and the court may not consider any aspect of the merits of the claim sought to be arbitrated, no matter how frivolous the claim may appear." *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998).

> rights or obligations of either party under this Agreement, the parties shall consult and negotiate with each other in good faith . . . . If they do not resolve the dispute, controversy, claim or disagreement … then [it] shall be resolved pursuant to confidential binding arbitration in New York, New York by a panel of three neutral arbitrators.[12]

Notwithstanding these provisions and the plain fact that their advancement claims are "with respect to an[] alleged breach" of the advancement provision of these agreements, the plaintiffs have advanced two principal arguments as to why this court should decide the advancement claims.

First, the plaintiffs argue that their claims for advancement should fall under the "equitable relief" carve-out of the arbitration provision of the parties' agreements. The arbitration provision states in relevant part:

> [This arbitration provision] shall not be construed to limit either party's right to obtain equitable relief with respect to any dispute and, pending a final arbitration by the arbitrators with respect to any such disputes, either party shall be entitled to obtain any such relief by direct application to state, federal or other applicable court, without being required to first arbitrate such dispute.[13]

The plaintiffs argue that a claim for advancement is a claim for equitable relief and therefore pursuant to the "equitable relief" carve-out, it may be pursued in this court, rather than by arbitration. The plaintiffs cite numerous cases in an

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[12] Yuen Termination Agreement § 13; Yuen Employment Agreement § 10(f); Leung Termination Agreement § 12; Leung Employment Agreement § 10(f).

[13] *Id.*

attempt to shore up this claim.[14] The plaintiffs' argument, however, is wide of the mark, as advancement is merely a contractual right that parties can agree to in the instruments that govern their relationship.[15] This court's statutory authority under 8 *Del. C.* § 145(k) to make determinations regarding advancement does not turn an advancement claim into a claim for equitable relief.[16]

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[14] The plaintiffs cite *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770 (Del. Ch. 1998), and *Tafeen v. Homestore, Inc.*, 2004 WL 556733 (Del. Ch. Mar. 16, 2004), for the proposition that a claim for advancement is a claim for equitable relief. Neither supports that proposition. In both cases, the court was asked to decide whether the defendant had properly raised the equitable defense of unclean hands to an advancement claim. In *Nakahara,* the court held that the equitable defense of unclean hands could be considered by a court of equity in deciding whether one's actions prevent him from pursuing his advancement claim in such a court. In *Tafeen*, the court, in reliance on *Nakahara,* held that a court of equity will not award advancement where the party requesting advancement has acted inequitably in seeking it. 2004 WL 556733, at *7 . Moreover, *Tafeen* noted that while the defense was "couched in terms of equity," it could "quite readily be conceptualized as [a] contractual defense[]," *id.* at *6 n.32, and thus signified its awareness that advancement is a contractual entitlement. A court of equity will consider the equities (and equitable defenses) in adjudicating claims before it, but this practice does not *ipso facto* guarantee that all of the claims before the court constitute claims for equitable relief.

[15] Until 1994, suits to enforce the right to indemnification and advancement were litigated in the Delaware Superior Court, because "such actions by their nature sought an award for money damages pursuant to contract." Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery,* § 8-2 (2004) ("Wolfe & Pittenger"). *See Salaman v. Nat'l Media Corp.*, 1992 WL 8795 (Del. Ch. Jan. 14, 1992) (holding that this court did not have subject matter jurisdiction over a claim for advancement when there was a sufficient remedy at law). Therefore, the Court of Chancery did not have subject matter jurisdiction over such claims until Section 145 of the DGCL was amended to vest the Court of Chancery with exclusive jurisdiction over actions for advancement and indemnification.

Pursuant to 8 *Del. C.* § 145(k), this court has "exclusive jurisdiction to hear and determine all actions for advancement of expenses … brought under this section or under any bylaw." This statutory authority expands this court's jurisdiction to hear advancement and indemnification claims, but it does not further affect the clear limits of this court's equity jurisdiction. *See* 10 *Del. C.* § 342.

[16] *See McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987) ("Neither the artful use nor the wholesale invocation of familiar chancery terms in a complaint will itself excuse the court, upon a proper motion, from a realistic assessment of the nature of the wrong alleged.").

Second, the plaintiffs argue that they have an independent right to advancement pursuant to the Certificate of Incorporation and Section 145 of the DGCL.[17] The plaintiffs ask the court to separate their contractual right to advancement in their Employment and Termination Agreements, which they admit is subject to arbitration, from their right to advancement pursuant to the Certificate and Section 145. The plaintiffs point to language in the indemnification provision of the Termination Agreements, section 10(f), that specifically recognizes that the plaintiffs retain rights separate from and in addition to the relief provided for in those agreements, such as the rights under the Certificate of Incorporation, as a basis for parsing out the separate rights to advancement.[18]

If the court were to adopt the plaintiffs' argument, the court would have to read section 10(f) in a vacuum without looking to the other provisions that together govern the parties' relationship. Each agreement has an integration clause, and there is an Umbrella Agreement to provide for a global integration of the agreements drafted when Gemstar was restructured.

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[17] The Certificate of Incorporation allows for the prepayment of legal fees for directors and officers upon receipt of an undertaking.

[18] Specifically §10(f) of the Termination Agreements provides:

> The parties acknowledge that, in addition to the rights provided in this [Indemnification provision], Employee has certain indemnification, defense and hold harmless rights as well as certain rights to be reimbursed for, or have the Company . . . advance or pay, certain costs and expenses . . . . Such rights are intended to be cumulative and the existence of any such right shall not limit or restrict in any way any other such right . . . .

Furthermore, the plaintiffs do not refer to the language in section 10 that refers specifically to advancement. Section 10(b) of the Termination Agreements provides for advancement "to the maximum extent permitted by applicable law . . . in defending any and all actions, suits, proceedings or investigations." Section 10(b) then expressly provides for advancement in the very types of proceedings for which the plaintiffs seek advancement in this action.[19] It is clear from the language in section 10(b) that the parties considered all the indemnification and advancement rights of the plaintiffs when negotiating the restructuring agreements. Sections 10(f) and 10(b) together evidence the clear intent of the parties that the rights under the Certificate are not diminished in any way, but preserved after the restructuring, and that the forum for deciding a dispute related to those rights is arbitration.

For the court to conclude that the arbitration provision does not cover the parties' dispute over advancement, the court must find either "an 'express provision' excluding the dispute from the coverage of the arbitration clause," or

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[19] Section 10(b) states in relevant part:

> The company shall promptly advance . . . [w]ithout limiting the generality of the foregoing, in (i) the class action lawsuits pending against Employee, the Company and others as of the Effective Date, (ii) any future stockholder lawsuits are brought naming Employee as a defendant, and (iii) any investigation, inquiry or request for information, formal or informal, by the Securities and Exchange Commission or any other governmental entity . . . .

"the most forceful evidence of purpose to exclude."[20] Here, the right to advancement for the pending actions against the plaintiffs and Gemstar is explicitly incorporated in their agreements. Thus, the plaintiffs have not only failed to meet the standard to rebut the strong presumption in favor of arbitration, but a plain language reading of the contract clearly provides for arbitration of disputes over the plaintiffs' claims for advancement.[21]

IV.

For the foregoing reasons, the defendants' motion to dismiss the complaint, without prejudice, in favor of arbitration, is GRANTED. IT IS SO ORDERED.

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[20] *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *3 (Del. Ch. Oct. 1, 2001) (quoting *SBC Interactive, Inc. v. Corporate Media Partners*, 1997 WL 810008, at *3 (Del. Ch. Dec. 29, 1997), *aff'd*, 714 A.2d 758, 761 (Del. 1998)).

[21] *See* Wolfe & Pittenger § 5-4[b] (2004) ("Thus, if there exists a potentially applicable arbitration clause, a presumption will arise in favor of arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'").